85-1926

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

STEPHEN V. HART,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

RICHARD DORAN,

Real Party.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. May a regulatory agency of the government violate the First Amendment by arbitrarily imposing conditions to an oral hearing thus effectively denying a defendant the opportunity to participate himself or through counsel?

2. Do certain "reparations" procedures of the Commodity Futures Trading Commission (CFTC), as they are being practiced, conflict with the freedom of expression, and with the right to inform and educate the public?

3. Is the CFTC's practice under the Commodity Exchange Act, authorized by the U.S. Congress, in conflict with the doctrine of separation of powers between the executive and judicial branches of our government?

4. Is an agency qualified to judge a case when it has been derelict in performing its duties, which, if performed, would have prevented the losses on which the case rests?

5. Can an order be challenged when its effect is a disproportionate penalty?

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Parties to this case are: Commodity Futures Trading Commission, 2033 K St. N.W., Washington DC 20581. (202 254-9880. Mr. Richard Doran, 415 S.W.Alder St., Portland OR 97204. (503) 228-4303. U.S.Court of Appeals, Ninth Circuit, POB 547, San Francisco CA 94101 (415) 556-6123.

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B	7	U.S. Court (as above), Unpublished Memorandum, May 1, 1985
C	4	CFTC Docket 82-R459. Order Denying Review, May 15, 1984
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO. _____

STEPHEN V. HART, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION,

RICHARD DORAN, REAL PARTY.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

Petitioner prays that a writ of certiorari issue to the U.S.Court of Appeals for the Ninth Circuit to review its judgement entered in this proceeding on May 1, 1985.

OPINIONS BELOW

U.S. Court of Appeals (9th Circuit), Docket # 84-7394: Unpublished Memorandum of May 1, 1985, and Order denying petition for rehearing of September 18, 1985. (App. B and A). Commodity Futures Trading Commission, Docket # 82-R459 : Initial Decision of December 9, 1983,/s/ William G. Spruill, Administrative Law Judge. Order denying review of May 15, 1984. (App. D and C).

JURISDICTION

The petition for rehearing in the appellate court was denied on September 18, 1985. This Court's order of December 31, 1985 extended time to file to January 16, 1986, and petition was filed by that date, but was returned for procedural defects three times. Delays were caused by petitioner's medical condition. This is the corrected petition.

This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law... abridging the freedom of speech, or of the press;..."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any person... be deprived of ...property without due process of law;..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "..nor shall any State.. deny any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

The following sections of the Futures Trading Act of 1978: Section 2(a)1; Section 40; Section 6(b) of the Futures Trading Act of 1982. Section 14 of Commodity Futures Trading Commission Act of 1974.

Statement of the Case

Holding Below

The CFTC held that petitioner should be liable together with Yorkstone Research et al. for the net losses incurred by plaintiff with interest from the plaintiff's opening of an account with Yorkstone. The appeals court did not reach the issue whether the time for filing a bond is unalterable.

Petitioner's Activity

Petitioner, age 73, is a retired university professor (engineering) and electronics executive who turned his life-long interest in "personal investing" into a second career. Since 1972 he wrote a column called "Investor's Perspective" for the monthly American Gold News. His articles gained him nationwide recognition because of their broad perspective and their educa-

tional value. The 78th article, published in September 1981, described, among other things, the "Dual Diversity Spread" which had been advertised by Yorkstone Research, Inc., of Albany, NY.

One of the readers, Richard Doran, responded and requested further information.

Petitioner's objective was and is to teach such investment strategies which can reduce risk. He does not sell securities or any other investments and does not render personal advice to individuals. Petitioner writes and lectures and has been invited speaker at National and International investment conferences. His reputation is unblemished. There have been no complaints against him (until this CFTC*

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* Commodity Futures Trading Commission referred to henceforth as CFTC or Commission; Mr. Richard Doran, as Doran.

action). He receives spontaneous laudatory letters from investors who benefited from his teachings.

The Yorkstone Case

Some time, late summer of 1981, James Massaro, the principal of Yorkstone, published a brochure which described a commodity futures trading technique involving spreads which are hedged with T-bill futures.1/

Petitioner had read Massaro's previous articles in the October 1979 issue of Commodities magazine on the "Reverse Feeder

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1/ The idea of "spreading," i.e., the simultaneous purchase and sale of related contracts, is acknowledged to reduce risk because a price change in the underlying commodity affects both sides of the transaction and thus, at least partially, cancels out. It is the differential between the two sides of the spread which can produce profits or losses. One of the hazards is a change in interest rates. The Yorkstone technique countered this hazard by simultaneously entering an interest

Spread" and his September 1978 article on the "Reverse Soybean Crush Spread." His reasonings were sound and those who followed his ideas could trade profitably while reducing risk. Hence, when the "Dual Diversity Spread" came to petitioner's attention in summer of 1981, he gave it serious consideration and described it in his column. There was no reason to suspect that Massaro might later become fraudulent. Exactly what happened to Massaro will perhaps be never known. Why did he "go crooked" end of December 1981 or early 1982? There is an intimation that he got involved with drug dealing and that he misappropriated clients' moneys (around January-February 1982, after Doran's unfor-

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futures contract to neutralize the effect of unforeseeable interest rate changes.

tunate trading experience) to cover debts. It is known that the FBI got involved.

The CFTC Hearing

Over petitioner's protest, the Administrative Law Judge (ALJ) scheduled a hearing in Portland, Oregon, whereas it should have been held in San Francisco according to the CFTC's own rules.2/ Also the time for discovery was compressed.3/

2/ At the time of the hearing Sect. 14(b) of the Act 7 USC 18 (1978) was in effect and provided, in pertinent part, (that the Commission) afford an opportunity for a hearing . . . in any place in which said person is engaged in business. Sect. 12.71(d) provides that when a proceeding reaches the oral hearing stage, the place of hearing shall be a place where the respondent is engaged in business . . . Rather than hold the hearing in San Francisco where the remaining respondent was engaged in business, the ALJ set the hearing in Portland because he was going there for other cases.

3/ In his Pre-hearing Order, ALJ stated that discovery by all parties be initiated by September 22 and concluded by October 22 (all dates in 1983), and prehearing state-

All parties except the petitioner were dismissed, were fugitives, or had settled; hence petitioner was the focus of the dialogue between complainant Doran and ALJ Spruill.

This "hearing" evidently formed the basis for the CFTC Decision from which appeal is being sought. It is poignant to observe that Doran's allegations were restated in dialogue form without even cursory reference to the extensive refutation, explanation and documentation furnished by Petitioner to the CFTC prior to the hearing (App. H-1 to 6).

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ment be filed by November 30. But on September 2, the ALJ set the hearing date for October 12, and required discovery be completed by October 3, leaving only a small window of time. Petitioner's request for cancellation of the October 12 hearing was denied.

Dealing with the question whether "due diligence" had been exercised, Doran told of his checking out the equity runs 4/ with an "ordinary broker" who, being "far from an expert" (Doran's words), ridiculed the printouts. The ALJ evidently accepted this hearsay as evidence, yet decided to omit the equity runs (computer records) from the exhibits.

During the "hearing" a lack of the ALJ's understanding of the Yorkstone strategy was revealed.5/

4/ Equity runs are required for every commodity futures trading account to ascertain daily margin requirements. Hence, the open positions are reiterated and current valuations are stated along with the initial contract prices. One of the uses of these "runs" is to determine whether a track record is actual or simulated. In this instance the prices shown in the records could be and were verified by comparison with the historic data. The records provided by Yorkstone were voluminous, not "groomed" for public consumption, therefore did not smack of promotion.

The petitioner being a teacher at heart desires to make complex strategies more understandable by the investing public. This desire to explain things was misinterpreted by the CFTC in its proceedings and in its briefs. Petitioner was blamed for having corresponded with his readers. It is true, the spread strategy is somewhat complex. The article in American Gold News (App. E-1 to 4) was space-limited. Therefore, a more detailed explanation was offered to inquirers. It was this supplementary material (App. F-1 to 4) which led the CFTC to the conclusion that

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5/ The ALJ commented, referring to the Yorkstone material, "Well, that's very interesting language there. I couldn't understand it. I don't have time and I don't think I'm going to spend the time to try and go through it; but obviously the language there is one that if a person follows it through, I think you'll just go around in circles . . . ."

Petitioner exceeded the bounds of a newspaper writer or reporter.6/

The "commission offer" was a theoretical "reward" offered spontaneously by Massaro when he read petitioner's article in American Gold News. It was not to be taken seriously and was, of course, never implemented (App. I- 6).

6/ Petitioner admits to his fault of being inclined to "believe" and to his capacity of generating great enthusiasm within himself when he believes to have made a discovery which could be useful to his listeners or readers. In the Yorkstone case, he genuinely felt that he was describing a technique which had accomplished the elusive goal of achieving above-average profits with concomitant reduction of risk. This enthusiasm showed in his communication to readers who had requested more information. His confidence in Yorkstone's capability to actually apply the complex strategies was bolstered by Massaro's announcement of the appointment of a Ph.D. from a New York university to do the computer programming (near end of article, App.E-3).

The "hearing" also dealt with the petitioner's seminar which Doran had attended.7/

The ALJ concluded the "hearing" with an expression of ambivalence.8/

The ALJ's Initial Decision

Upon reading the transcript, Petitioner attempted to correct the many misconceptions and distortions in his Post-Hearing Response (App. I-1 to 10). Nevertheless, the Initial Decision was merely based on the one-sided hearing. Not only is the Petitioner found responsible for Doran's total loss of $12,935, but, arbitrarily, 11% annual interest is added, starting at a time before any loss had actually occurred (App. D-20).

7/ As a matter of record, petitioner's seminars are educational in character as distinguished from the many commercial seminars which are often disguised sales

The ALJ stated (App. D-16):

> From the findings in In the Matter of Yorkstone et al., supra., an enforcement matter, it is established that the scheme employed by Yorkstone through Massaro and DeSanto was fraudulent. The material supplied by respondent was therefore also fraudulent. Respondent, if indeed he had exercised due diligence, could or should have discovered this.

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presentations. By virtue of petitioner's decades of university level teaching experience, his seminars as well as his writings are instructional in nature and in purpose. However, practitioner considers himself to be a pragmatist. To the extent of his modest financial means he does invest in some of the strategies which he analyzes and describes.

8/ Quoting from the transcript: "I have a very difficult time signing the full amount of $12,900, unless Mr. Hart--I believe he participated. I am not fully certain that he participated in the extent Yorkstone, Massaro and DeSanto participated. However, from what I've seen here today, I believe his participation was such that he did act in the manner of a CTA, and his actions were such that they are those which require a person to be registered, and he was not registered. That, upon his representation you did lose a goodly sum of money."

The CFTC echoed this, by stating in its Order Denying Review, (footnote App. C-2) "The nature and extent of these frauds fully support the ALJ's conclusion in Doran that respondent Hart failed to exercise due diligence." Petitioner submits that this type of reasoning is fallacious. It is hardly fair to use discoveries in another proceeding, after the fact, in a prior proceeding.9/

9/ The ALJ dealt with the petitioner's argument that Doran has sustained his losses due to Yorkstone's spurious trades and not through trades which were described in his article as follows:

> "Although (Hart) contends (Doran) did not lose his funds in the scheme presented, this is of no consequence. After feeding a mouse to a cat, it matters little exactly how the mouse dies. The result is the same. It dies at the hands of the cat. Likewise it does not really matter how the complainant specifically lost his money to the fraudulent operator."

It is suggested that this type of reasoning is open to question.

Following receipt of this Decision, petitioner filed his Application for Commission Review on December 23, 1983 (App. J-1 through 12). It was not until May 15, 1984 that the CFTC's Order Denying Review was docketed and mailed to petitioner but not received by him until June 4. This Denial (App. C-1 through 4), consists of two pages of boiler-plate wording with exception of two footnotes: The first, refers to the CFTC's administrative proceedings against Yorkstone quoted earlier. The second, refers to appeal rights. There is no mention of a bond requirement except for a buried reference to a section of regulations.

The "double bond" Requirement

In preparing for his appeal, petitioner studied the detailed instructions furnished by the Ninth Circuit and the

booklets published by the Government Printing Office (Federal Rules of Appellate Procedure, and specific rules of the Ninth Circuit). Occasional references to possible bond requirements do not apply to the instant case. A layman could remain unaware of the applicability of separate requirements by the CFTC. It appeared that the Appeals Court's instructions were to take precedence.

The appeal was docketed on June 11, one week after receipt of CFTC's denial. At no time was it made known to petitioner either by the Ninth Circuit or by the CFTC that his appeal was defective because it had not been accompanied by the filing of a double bond. Waiting until the statutory time limit for such filing had elapsed, the CFTC then moved to have the appeal dismissed because a bond had not been

filed.10/ Having been thus alerted, the petitioner immediately marshaled his resources and filed the double bond, i.e., $34,500, on July 13, 1984. At that time attorney Charles Jarvis Murray entered his appearance on petitioner's behalf.

In the Court of Appeals

On March 6, 1985 there was a brief hearing resulting in (May 1) an unpublished Memorandum (App. B-1 to B-7) docketed on June 17, 1985 was denied on September 18 (App. A-1,2).

On May 28 the General Counsel for the CFTC addressed a letter to the court

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10/ The Appeals Court cites (App. B-6) Kessenich v. CFTC, 684 F.2d 88, 93 (D.C. Cir. 1982). In Kessenich, the petitioner was represented by counsel throughout the proceedings.

requesting that the May 1 Memorandum be published.11/

11/ "First, the Court's decision contains an important discussion of the definition of 'commodity trading advisor' . . .

". . . the Act excludes from this definition any 'news reporter, news columnist . . . .' In its May 1 decision, the Court analyzed this 'news reporter' exception to the 'commodity trading advisor' definition, concluding that an individual who writes a column on commodity investments but also corresponds with investors and conducts investment seminars for a fee cannot avail "himself of this exception. The Court also explained that an individual need not receive compensation from a commodity broker in order to qualify as a 'commodity trading advisor.'

"Second, the Court's decision contains a significant discussion of the provision of the Act that conditions an individual's right to appeal from a Commission reparations award upon the filing of an appropriate bond. The Court rejected the argument that a petitioner's ignorance of the bond requirement excuses the timely filing of the bond when the administrative decision contains the Commission's standard language referring to this section of the Act.

". . . there is very little published precedent on point. By publishing the memorandum decision in this case, the Court

Petitioner believes that this request from the CFTC shows that the appeals court misapprehended some of the issues and actually interpreted some of the regulations in even broader terms than the CFTC or than Congress intended.12/ The CFTC's request for publication was subsequently denied.

ARGUMENT

1. The importance of "Due Process" is dramatized by the Case Doran v. Yorkstone.

If an example were needed to show how crucial is the individual's privilege to be heard in court in order for him to obtain justice, then the above-described case can serve well. It has been noted that exten-

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would provide guidance to future litigants and would assist in the development of a consistent body of commodity futures case law" (App. K-2, 3).

sive written argument and testimony, buttressed with evidential proof and documents filed as exhibits, can be disregarded and hearsay evidence from an uninformed "ordinary broker" can be admitted.

The crucial issue of fraudulent intent was bypassed and a "case" was made by self-serving interpretations of the Commission's own rules.

In conclusion, the ALJ, without benefit of argument, held that the liability of the respondents was joint and several, knowing that the petitioner alone remained as viable defendant and would therefore have to carry the whole burden of the judgment.

12/ In Lowe v. SEC, v. 105, U.S. Sup. Ct. Rptr., pg. 2557, Docket No. 83-1911, on June 3, 1985, this Court seems to have ruled against a too expansive interpretation of an agency's jurisdiction.

It is suggested that such an outcome is manifestly in conflict with the mandate Congress has vested in the Commission. A reparations proceeding is not meant to be a vindictive pursuit. Throughout the Futures Trading Act and its subsequent interpretations, reparations procedure, which is unique in the regulatory agencies arena, is to provide a forum for resolving differences. It is presumed that such a forum is conducted evenhandedly. The conclusion is inescapable that in the instant case the CFTC exceeded its mandate. The refusal to grant the petitioner the opportunity for a fair hearing is therefore poignant.

2. The Commission had privileged information which, if acted upon, would have forestalled Doran's losses.

The Yorkstone literature listed the CFTC as a reference and concluded its brochure with the statement that the firm was registered with the CFTC. The literature was filed with the CFTC, presumably before being released to the public. Hence, the CFTC was provided with the track records printed in the brochure. It is a matter of routine for the agency to check on the authenticity of such a record, especially when it is purported to be based on actual trading. Barring unforgivable negligence, it must be assumed that the CFTC knew, somewhere within its ranks, that the track records were not based on actual trading because Yorkstone did not have a trading account at the time of the purported transactions. Hence, in pursuit of its duties as a regulatory agency, the CFTC knew, or should have known, that Yorkstone's presen-

tation needed to be changed so as to alert the public that the records were actually computer simulations. This would have been a fair warning to exercise caution. Furthermore, the CFTC received ample indications that "all was not well" with Yorkstone when it received numerous complaints (Doran's being the first or among the first). Yet it was not until July 7, 1983 that the Initial Decision was rendered by the CFTC and on July 30 that it obtained a "temporary restraining order" against Yorkstone in a joint action with the State of New York.

Because of these dilatory actions the principals of Yorkstone had the time to defraud numerous investors and to abscond with their funds. The conclusion is obvious: Had the CFTC performed its regulatory function in a timely manner then the

funds to reimburse Doran for his losses could have been impounded.

The question may be raised whether the CFTC is guilty of contributory negligence in this case and whether it should disqualify itself as an impartial judge in the foregoing proceedings.

3. "Intent" assumes importance when there are no previous cases that can serve as model for decision-making.

Inasmuch as there are no previous cases on which to base a well-supported decision, the question of "intent" emerges as important, perhaps even crucially important.

At no time was there even an intimation that the petitioner acted with malice, that his intentions were selfish, self-serving, impure or even vaguely fraudulent. It is true, he was duped, he acted with

misplaced confidence and enthusiasm. He also acted in ignorance, excusable or not, regarding the regulations governing his appeal. But as to intent, even the CFTC cannot deny his sincerity during his pursuit of his rights on a pro se basis vs. the CFTC and his sense of duty toward his readers. The record shows that he achieved at least one investor having his deposit returned. Thus, absent an intent to defraud it is difficult to see how he deserves to be ". . . deprived of . . . property . . ." (Fifth Amendment).

The multi-year history of the petitioner's activities as teacher of and writer on investment topics shows that, as in the case at issue, he never handled moneys, nor aspired to benefit from his work other than by his modest honorariums, or by occasionally investing in the pro-

grams he described. In many instances he first tried a technique with his own money to check its efficacy before describing it to his readers. A policy of full disclosure prevailed in those cases. Furthermore, the petitioner aspired to act as a clearinghouse for not generally available investment information, the good and the bad. Thus one reader's experience could be shared with other readers through his column. Many readers benefited from this "consumer advocate" type service. Certainly these historic facts have a bearing on the petitioner's "intent."

In summary, this case raises some important issues, e.g., whether "due process was denied because of arbitrary action on the ALJ's part; whether the

contributory delay in the agency's pursuit of the fraudulent party compromised its ability to judge the case evenhandedly; whether the agency "stretched" its mandate beyond the bounds intended by the Congress. The question was asked whether the reparations procedure, as practiced by the agency is not in conflict with the doctrine of separation of powers between the executive and judicial branches of government. Finally, the "double bond" requirement may need to be adjudged in view of the sincere efforts to comply with complex, and partially contradictory, rules of the appellate court and the agency.

In view of the somewhat complex issues and the lack of clearcut parallels in prior cases, a full hearing is needed in order that fairness and justice may prevail.

CONCLUSION

For the foregoing reasons, this petitioner respectfully requests that this Court grant certiorari to correct violations of the First, Fifth , and Fourteenth Amendments that will result if the Court of Appeals does not grant a rehearing.

May 20, 1986

Respectfully
Respectfully submitted,

Stephen V. Hart
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Pro Se

Appendix A is an Order denying Petition for a rehearing by the U.S. Court of Appeals for the Ninth Circuit, filed September 18, 1985.

Text is as follows:

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Stephen V. Hart, Petitioner
v. Commodity Future Trading Commission, Respondent, Richard Doran, Real Party.

No. 84-7394/DC No. CFTC 82-R459

ORDER

On Appeal from an Order of the Commodity Futures Trading Commission

Argued and Submitted March 6, 1985, Portland, Oregon.

Before: KENNEDY and NORRIS, Circuit Judges; and LYNCH*, District Judge.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a hearing en banc.

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* The Honorable Eugene F. Lynch, U.S. District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing is REJECTED.

Respondent's request for publication of the disposition is denied.

Appendix B is an unpublished Memorandum of the United States Court of Appeals for the Ninth Circuit filed on May 1, 1985.

Text is as follows:

(Stamped "Not for Publication")

United States Court of Appeals for the Ninth Circuit

Stephen V. Hart, Petitioner
v. Commodity Futures Trading Commission, Respondent, Richard Doran, Real Party

No. 84-7394
DC No. CFTC 82-R459

MEMORANDUM*

On Appeal from an Order of the Commodity Futures Trading Commission

Argued and Submitted March 6, 1985, Portland, OR

Before: KENNEDY and NORRIS, Circuit Judges; and LYNCH**, District Judge.

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* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by

Petitioner appeals a final decision and order of the Commodity Futures Trading Commission ("Commission") requiring him to pay reparations of $12,935.00 plus interest and filing fee for violating sections 4o(1)(A) and (B) of the Commodity Exchange Act ("Act"), 7 U.S.C. § 6o(1)(A) and (B) (Supp. V 1981). We dismiss the appeal because of petitioner's failure to file a timely bond in accordance with section 14(e) of the Act, 7 U.S.C. § 18(e) (1982) (Apx.11).

I

We first address the issue whether the Commission had jurisdiction over petitioner in the reparation proceeding below. At the time of that proceeding, the Commission had jurisdiction to hear a reparation action

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the courts of this circuit, except as provided in Rule 21(c).

against any person registered or required to be registered as a "commodity trading advisor" ("CTA"). 7 U.S.C. § 18(a) (Supp. V 1981); 7 U.S.C. § 6m (Supp. V 1981) (Apx. 4). A CTA was defined as:

> any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery . . . or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include . . . (ii) any newspaper reporter . . . provided that the furnishing of such services . . . is solely incidental to the conduct of their business or profession.

7 U.S.C. § 2 (Supp. V 1981).

Petitioner contends that the Commission lacked jurisdiction over him because he fell within the exception for newspaper

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** The Honorable Eugene F. Lynch, U. S. District Judge for the Northern District of California, sitting by designation.

reporters. We disagree[1]. Petitioner wrote a column on investments, including commodities, in which he held himself out as an expert; he corresponded with investors who responded to his columns, dispensing further advice to them; he conducted investment seminars at the cost of $75 per person; and he formed a circle of readers who attended his seminars and became a part of his investment network. In short, petitioner's advisory services were not "solely incidental" to the conduct of reporting. Indeed, as the ALJ found, petitioner's column was used to promote his advisory activities and to solicit funds for investments. The Commission had jurisdiction

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[1] Petitioner's second contention--that he was not a CTA because he did not receive compensation from Yorkstone--is similarly without merit. The Act does not require that a CTA be one who receives compensation from the commodity broker.

over petitioner in the reparation proceeding below.

II

We now address the issue whether we may hear this appeal despite petitioner's failure to file a timely bond as required by section 14(e) of the Act. Section 14(e) provides that any order of the Commission is reviewable by a court of appeals but that:

> Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail.

7 U.S.C. § 18(e) (1982).[2/] Respondent con-

2/ In Saharoff v. Stone, 638 F.2d 90,91-92 (9th Cir. 1980), this court held that the filing of a bond is a mandatory requirement of the Act without which judicial review cannot be obtained. This

tends that the time requirement of section 14(e) is both jurisdictional and unalterable.[3] Petitioner maintains that equitable considerations dictate that his appeal be heard. We conclude that the equities do not weigh in petitioner's favor and therefore do not reach the issue whether the time for filing a bond is subject to equitable modification or whether it is jurisdictional and unalterable.

As support for his contentions that the equities mandate appellate review,

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court did not address, however, the time requirement for the filing of a bond.

[3] See Kessenich v. Commodity Futures Trading Comm'n., 684 F. 2d 88,91-93,93n.5. (D.C. Cir. 1982) (indicating that the time for filing a bond is both jurisdictional and unalterable, but also noting that even were the time subject to equitable modification, petitioner "has not demonstrated any adequate basis on which to grant enlargement of the time in this case.")

petitioner states that he was unaware of the bond requirement. The Commission's order, however, denying the review of the ALJ's initial decision and rendering that decision final, explicitly advised petitioner that an appeal had to be taken within 15 days "pursuant to section 14(e) of the Act." As noted above, it is section 14(e) that expressly provides that a bond must be posted. Petitioner's claim of lack of knowledge is therefore unavailing; the equities do not weigh in his favor.

DISMISSED.

Appendix C is an Order denying Review by the Commodity Futures Trading Commission, May 15, 1984.

Text is as follows:

UNITED STATES OF AMERICA Before the COMMODITY FUTURES TRADING COMMISSION

Richard Doran
v. Yorkstone Research, Inc., James Massaro, Mark DeSanto, Stephen Hart, Lincolnwood, Inc., Alan Cohen and American Gold News.

CFTC Docket No. 82-R459

ORDER DENYING REVIEW

Upon consideration of the application for review and the record as a whole, the Commission has discerned no question of law or public policy to warrant Commission consideration of the merits of the initial decision filed by the Presiding Officer.[1/]

[1/] Respondent Hart's application for review fails to show proof of service on complainant, as required by 17 C.F.R. §§ 12.101(a)(1) and 12.48(c) (1983). This procedural defect provides additional grounds for denying the relief sought.

Accordingly, the Commission has determined that the application for review should be denied. In making this determination, the Commission has neither adopted the Presiding Officer's order as its own nor affirmatively passed upon any of the issues decided therein. Thus, although the Commission has determined to permit the initial decision to become final as to the parties, the order shall not be binding as a Commission decision in other cases.

Accordingly, IT IS ORDERED that the initial decision of the Presiding Officer shall become final with respect to the

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For further information about respondents Yorkstone's and Massaro's frauds, see In re Yorkstone Research, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,771 (Initial Decision on Default, July 7, 1983). The nature and extent of these frauds fully support the ALJ's conclusion in Doran that respondent Hart failed to exercise due diligence (ID, at 6, 8).

parties upon service of this Order on the parties by the Hearing Clerk.[2/]

By the Commission (Chairman PHILLIPS and Commissioners HINEMAN, and SEALE; Commissioner WEST not participating).

(s)

Jane K. Stuckey
Secretary of the Commission
Commodity Futures Trading Commission

Dated: May 15, 1984

2/ Any appeal from a Commission order must be taken within fifteen days of service of this order pursuant to section 14(e) of the Act, 7 U.S.C. § 18(e) (1982), as it incorporates by reference section 6(b) of the Act, 7 U.S.C. § 9 (1982).

Pursuant to section 14(d) of the Act, 7 U.S.C. § 18(d) (1982), a party against whom a reparation award has been made may be sued in United States district court to enforce the award if such party does not make payment within the period specified in the order making the award, or within 15 days of service of this order by the Hearing Clerk if no period is specified.

Pursuant to section 14(f) of the Act, 7 U.S.C. § 18(f) (1982). unless the party

against whom a reparation order has been made provides to the Commission, within 15 days from the expiration of the period specified in the order for compliance, or within 30 days of service of this order by the Hearing Clerk if no period is specified, satisfactory evidence that either (1) an appeal has been taken pursuant to section 14(e), or (2) payment of the full amount of the award (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all contract markets and, if the party is registered with the Commission, such registration shall be suspended automatically. Such a prohibition and suspension shall remain in effect until such party provides to the Commission satisfactory evidence that payment of the full amount of the award with interest thereon to the date of payment has been made.

Appendix D is an Initial Decision from the Commodity Futures Trading Commission, filed December 9, 1983.

Text is as follows:

United States of America, COMMODITY FUTURES TRADING COMMISSION, 2033 K Street, N.W., Washington, D.C. 20581

CFTC Docket No. 82-R459

INITIAL DECISION

Found: Respondents Yorkstone, Massaro, DeSanto, and Hart violated Sec. 4o of the Act. Reparations ordered. Complaint against respondent American Gold News dismissed. Complaint against respondents Lincolnwood, Inc., and Cohen settled.

Appearances: Richard Doran, complainant
pro se
415 Southwest Alder
Portland, OR 97204

Cecil Helms, respondent
American Gold News, pro se
263 Church Street
Ione, CA 95640

Stephen Hart, respondent,
pro se, participating on the record
341 Dorantes Avenue
San Francisco, CA 94116

Before: William G. Spruill
Administrative Law Judge

Statement of the Case

This proceeding involves a reparation complaint under Section 14 or the Commodity Exchange Act, as amended ("the Act"), 7 U.S.C. Sec. 18 and jurisdiction is thereby obtained. The complaint, as amended, was brought by complainant Richard Doran against Yorkstone Research, Inc., James Massaro, Mark J. DeSanto, Lincolnwood, Inc., Alan R. Cohen, Stephen V. Hart, and American Gold News. The complaint was filed February 16, 1982. It was forwarded by the Complaints Section to the Hearings Section on September 8, 1982, for formal adjudication. The complaint was thereafter amended on January 12, 1983, and assigned to my docket on June 15, 1983. An oral hearing was held on October 12, 1983, in Portland, OR.

At the commencement of the hearing, respondent American Gold News was dismissed, on motion, relative to jurisdiction over that party. American Gold News is a publication that prints various submissions by individual columnists. The action here involves one of the columnists, but there is no allegation that American Gold News acted in any manner other than as the publisher of a bona fide financial publication of general circulation. There was no allegation that American Gold News had done anything other than to provide a forum from which one of the other respondents could issue actionable statements. Accordingly, the complaint against American Gold News was dismissed under an exemption from jurisdiction provided by Sec. 2(a)(1)(iv) of the Act.

Yorkstone Research, Inc., James Massaro and Mark J. DeSanto failed to answer the complaint as required, and they were found to be in default in a Prehearing Order entered August 27, 1983. Accordingly, the allegations of the complaint are deemed to be true and correct against those named individuals and entity. As to those respondents the allegations of the complaint will constitute factual findings without further summary.

It was noted on the record that complainant had reached a settlement with respondents Alan R. Cohen and Lincolnwood, Inc. for $500 each. Therefore, the only remaining respondent is Stephen V. Hart. Respondent Hart did not appear at the hearing. However, he did indicate an intention to continue participation on the record and filed a statement with exhibits. He also

requested that he be granted time to file a post hearing response. Said Post Hearing Response dated November 21, 1983 was duly filed. All material filed by respondent has been considered even though much was not verified and there was no opportunity for complainant to cross examine.

Among other things, respondent now seeks additional hearings inasmuch as he feels that the oral testimony was prejudicial to his case. He first asserts that he was affected by an accident which caused a cut above his eye. The accident occurred on August 18, 1983, at the San Francisco Recreation and Parks Sauna Pool; that first aid consisting of bandaging was administered; that Mr. Hart refused an ambulance; and that he was taken to a hospital emergency room. There is no reference to any other medical problem except by a general

allegation. Without more specific data it cannot be presumed that a head cut or concussion suffered in August should prevent hearing participation two months later in October. Secondly, he makes reference to a recent death in his family as preventing participation. This matter was not raised earlier when he filed his initial statement and exhibits, but it does not appear to warrant further hearing in any event. Accordingly, the respondent's request for a continued hearing procedure is denied.

Factual Summary

On September 30, 1981, complainant was induced to forward $15,000 to Lincolnwood, Inc. to become part of a pool managed by respondent Yorkstone Research, Inc. (a registered Commodity Trading Advisor), a firm run by respondents James Massaro and Mark DeSanto. Yorkstone and Massaro were

found to be in violation of Sections 4b(a) and 4o(1) of the Act and certain Commission regulations in an enforcement proceeding In the Matter of Yorkstone Research, Inc., and James W. Massaro, CFTC Docket No. 83-34, Initial Decision on Default entered July 7, 1983. In that decision it was noted that as part of Yorkstone's sales campaign it disseminated a nine-page brochure entitled Diversity Spread Trading program; an introductory letter; and a 52-page computer printout. The brochure contained six pages of statistics in the form of graphs and tables which showed profitable results, but the statistics did not reflect actual performance. The computer printouts of asserted Yorkstone Trades were also fictitious. There is no question about the fraudulent nature of the Yorkstone activities. However, in this matter the concern

is whether respondent Hart participated in the scheme or acted in such a manner as to have induced complainant to fall victim to the scheme.

Respondent Stephen Hart is an engineer and retired college professor who is approximately 71 years of age. Assertedly he has been engaged in investments and commodity trading for over 30 years. He terms himself as a "financial writer" and contends that his articles are "reportage" that describe strategies rather than individual investments. One such article appeared in a newsletter publication titled American Gold News. The article was labeled "Investor's Perspective #78," as a sort of column title. The column was in two sections. One section described another newsletter publication while the second section described a trading system

similar to that touted by Yorkstone. The end of the column offered a subscription opportunity to the described newsletter to be handled by Hart, an announcement of Hart's seminar advertising "practically risk-free strategies," and an address for correspondence using the column by-line of "Investor's Perspective" with a San Francisco Post Office Box. Neither Yorkstone or Massaro were named in the article, but Hart did state:

> ". . . I am definitely going to participate but the minimum is $15,000 so if anyone wishes to join me, please write QUICKLY & indicate how much you'd consider putting in. Include yr [sic] phone #. You'll receive further details to help you decide. This may indeed be the 'ultimate' program, the 'philosophers' stone' . . ."

Complainant did seek the "further details." Respondent Hart sent some charts which he stated ". . . are all the trades (actual, not 'simulated'). . ." and some

information wherein he identified the system as Yorkstone's Diversity Spread Trading Program. He further asserted a knowledge of Massaro and personal familiarity for many years and that he had obtained equity runs and determined the authenticity of the purported trades. He thereafter made a proposal to invest as a group, and indicated that complainant's name was being forwarded to Yorkstone. He stressed an urgency to act on the program, to say the least. It concluded, "I look forward to our joining together in this extraordinary investment."

It later appeared that Massaro had promised Hart "a small fraction of the commission . . ." but Hart disavows having received any. Complainant also attended a seminar in San Francisco conducted by Hart. The fee for this was $75.00 and about 25

persons attended. At the seminar Hart again promoted the Yorkstone operation and talked of organizing a pool. Other investment/speculative ventures were also discussed.

Complainant, acting on the advice of respondent Hart, did forward $15,000 to Lincolnwood, Inc. to be traded by Yorkstone and Massaro. However, he also sent Yorkstone a memo requesting a copy of Massaro's application to this agency for registration as a trading advisor. He further indicated that he did not want the account traded until he received the information. The requested information was not sent, but the account was traded anyway. Complainant finally got the account closed and was returned $1,065.

Complainant later took the equity run supplied by Hart which purportedly substan-

tiated Yorkstone's trades to another broker for analysis. It was reported that there was no substance to them. Many trades were shown at the same price on multiple contract positions for trade after trade, which would be unlikely or practically impossible. It was further reported that a person knowledgeable in this field should have known that it was a hoax. Respondent emphatically denies this and contends that he was exercising due diligence in this matter.

Respondent, as noted, argues that he is only a "financial writer," and that his writings were only reportage. He further argues that the Yorkstone trading theory was not disproved because complainant's money was lost through other irregular trading operations. He also states that he did in fact intend to add his own funds but

"fortunately" had not done so when the problems were discovered. He feels that he was himself "a believer" and conveyed his belief--nothing more.

Discussion and Conclusions

There is little doubt that respondent Hart's activities are (1) those of a commodity trading advisor and (2) possibly those of a commodity pool operator. Sec. 2(a)(1) of the Act defines the term "commodity trading advisor" as:

> any person who, for compensation or profit, engages in the business of advising other, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for further delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (ii) any newspaper reporter, newspaper columnist, newspaper editor, Provided that the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession.

Hart professes to be a newspaper columnist or reporter, but his advice is not incidental to the conduct of reporting. Instead, the column is used to promote his activities and solicit funds. It is no different from an advertisement except that it is probably more misleading because he seemingly lends his own unbiased support to a program. He certainly gives advice through publication and writings as to the advisability of trading. He certainly does seek compensation for his services. These activities are those of a commodity trading advisor ("CTA").

The term "commodity pool operator" is defined as:

> any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts or receives from others, funds for the purpose in any commodity for future delivery . . . .

Although his business (noted above) is not an investment trust, or syndicate, it is similar. He has a network of adherents for whom he provides investment services. In connection with that business, he did solicit funds to join a pool for speculation with Yorkstone. The activities are those of a commodity pool operator ("CPO"). Sec. 4m of the Act requires persons doing business as a CTA or CPO to be registered with the C.F.T.C. This Commission has jurisdiction under Sec. 14(a) of the Act over its registrants or anyone required to be registered. 1/ In this matter, respondent Hart is not registered but is required to be registered. Even if not required to be registered, his acts were sufficiently similar to that of either a CTA or CPO to

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1/ Prior to May 11, 1983.

bring him within the jurisdiction of Sec. 4o of the Act. See, Parver v. Patton, '80-'82 COMM. FUT. L. REP. ("CCH") ¶21,454. Accordingly, there is jurisdiction present to determine this action against respondent Hart. Official notice may be taken in a reparation proceeding of matters of record including evidence and findings in an enforcement proceeding. See, Olson v. First Regal Commodities, Inc., Commission Opinion and Order, CFTC Docket R77-287, December 3, 1981. From the findings in In the Matter of Yorkstone et al., supra., an enforcement matter, it is established that the scheme employed by Yorkstone through Massaro and DeSanto was fraudulent. The material supplied by respondent was therefore also fraudulent. Respondent, if indeed he had exercised due diligence, could or should have discovered this. After all, he reportedly had over 30 years of experience.

His unequivocal support and claim of low risk is misleading under any circumstance. There is no low risk commodity futures transaction. He touted the firm to complainant under misleading conditions and complainant lost $13,935 as a result thereof. Therefore, respondent Hart shares the responsibility for paying reparations to complainant along with respondents Yorkstone Research, Inc., James Massaro, and Mark DeSanto.

Although respondent Hart contends that complainant did not lose his funds in the scheme presented, this is of no consequence. After feeding a mouse to a cat, it matters little exactly how the mouse dies. The result is the same. It dies at the hands of the cat. Likewise it does not really matter how the complainant specifically lost his money to the fraudulent

operator. Respondent Hart wrongfully induced and mislead complainant into making the speculation.

Although complainant did lose $13,935, he has settled for $500 each against Lincolnwood and Alan Cohen. Therefore, this amount ($1,000) will be deducted from the reparations award.

In fraud cases, prejudgment interest is normally awarded. There are no equitable or extenuating circumstances in this proceeding to alter that practice.

Although a reparation award in favor of complainant is made herein, this does not guarantee financial satisfaction. The Commodity Futures Trading Commission does not make or guarantee payment. If the respondents are registered and are still conducting business, said persons may be suspended from trading if the award is not

satisfied after appeals are taken. If the wrongful action was blatantly fraudulent, the respondents are no longer in business, or they lack the financial ability to satisfy the award, the chances of collecting the award are greatly diminished. In such instances, a complainant will have to seek satisfaction of the award through legal action in the District Court as provided under Section 14(f) of the Act 7 U.S.C. Section 18(f), if any judgment assignable assets can be located.

Findings

1. Respondents Yorkstone Research, Inc., James Massaro, Mark DeSanto, and Stephen Hart are, or are required to be, registered as CTA's or CPO's and are within the jurisdiction of this agency.

2. Said respondents violated Sec. 4o (A) and (B) of the Act.

3. As a result of the violations complainant has lost $12,935.

4. The complaint against respondents American Gold News, Lincolnwood, Inc., and Alan Cohen is dismissed for cause of settlement.

5. Respondents Yorkstone Research, Inc., James Massaro, Mark DeSanto, and Stephen Hart shall pay reparations to the complainant.

ORDER

It is hereby ORDERED that respondents Yorkstone Research, Inc., James Massaro, Mark DeSanto, and Stephen Hart pay reparations to complainant Richard Doran, immediately, this date, in the amount of $12,935, with interest at the annual rate of 11 percent from September 30, 1981 to the date of payment, plus $25.00, the amount of the filing fee. The liability of respondents is joint and several.

Dated this 9th day of December, 1983

(s)

William G. Spruill
Administrative Law Judge

Appendix E is from Petitioner's article appearing in American Gold News, September 1981, as Investor's Perspective #78. Text in pertinent parts is as follows (charts omitted):

INVESTOR'S PERSPECTIVE #78

SUPER PROFITS WITHOUT RISK?

People are pursuing computer-directed commodity trading programs as the philosophers' stone to riches. But in recent times the results have been disappointing. Those programs depend upon established trends and lose money when markets are erratic and capricious. The pros are more likely to look to spreads for making consistent profits. They take simultaneous long and short positions in the same commodity @ different delivery months ("Inter-delivery Spreads"). They concentrate on storable commodities such as metals, soy-

beans, etc. They profit not from the rise or fall of the futures contracts but from the narrowing or widening of the Spread.

We are describing here arbitrage combined with spread training. Two things have to be watched: First, the various eligible inter-delivery spreads must be monitored on a continuing basis for their volatility and their aberrations from "normal" value. Such aberrations may occur on the average once a month. Sometimes there are many months which lack such opportunity. Depending on the volatility of the particular spread and the T-bill contracts, one computes the ratio which would compensate for unexpected interest fluctuations.

By taking into account the prevailing rate of fluctuations (volatility), it was

determined that one T-bill contract should be paired with 25 spreads.

It takes a Ph.D., a commodity trader's expertise, and a good computer programmer to set up the trading system which monitors, on a continuing basis, the spread possibilities in the carrying charge markets, along with the T-bill contract. Target prices for the purchase/sale are determined and sent to the skilled broker. Many days go by. Each day the open orders are modified to fit the prevailing market. Then, inevitably, the day arrives when the order can be filled.

SUMMARY: A research team headed by a Ph.D. of economics has perfected an arbitrage spread trading program. They are approaching the limit of contracts that can be handled without affecting the markets. I am definitely going to participate, but

the minimum is $15,000 so if anyone wishes to join me, please write QUICKLY & indicate how much you'd consider putting in. Include yr phone #. You'll receive further details to help you decide. This may indeed be the "ultimate" program, the "Philosophers' Stone" . . . .

Appendix F is from Petitioner's letter of October 1981 to inquirers re: his article (Investor's Perspective #78).

Text in pertinent parts is as follows:

No wonder that my article (IP #78) brought a big response! That idea of "arbitraged spreads" sounds almost too good to be true.

So, I obtained the equity runs of an account which had participated in the whole trading program. There it was: Every trade, every profit was verified. It is good and it is true.

Please look over the enclosed page with the figures and the graphs. Notice how the program takes advantage of temporary excesses in the market and methodically pin-points where to get in and where to get out. Although I've been exposed to many "systems" in commodity trading, I've never run into one which is so efficient.

The accounts are traded on a discretionary basis by Yorkstone Research. James W. Massaro, the president, is known in the financial community for his innovative ideas. His articles have appeared in COMMODITIES magazine. I've been in touch with him for many years. In my opinion, this spread trading program (he calls it "Diversity Spread Trading Program") is the culmination of his 17 years of systems development in commodity trading.

Most trading advisors charge a monthly "management fee." But Yorkstone waives all set-up charges and management fees. Instead, they participate in the net profits: After the account has doubled in value the company is entitled to 40% of the excess. This certainly demonstrates their confidence in achieving results.

A trading unit is $15,000. After examining the trading record I find that occasionally some of the trades may overlap in time. Therefore I'd suggest that our account be capitalized at a multiple of this minimum figure so that we can take advantage of all trades, like the model account described in the enclosure. Also, once there's $50,000 in the account we can purchase T-bills so that the money earns interest while it waits for the next entry point.

It is proposed that we invest as a group. Yorkstone has set aside for us five (5) units ($75,000). From the indications of interest I've received from you we'll easily reach this limit. Since I don't know whether additional units will be available it is only fair that we handle each subscription on a "first come" basis.

In order to save time I've forwarded your name to Yorkstone so that they can mail you the documentation. Expect to receive the 9-page buff colored brochure containing 3 pages of text and the charts & figures which I have reduced for use in my enclosure. You will also receive the usual forms for opening an account together with the trading authorization for Yorkstone.

We will be individuals investing together as tenants in common, everyone having a pro-rata interest in the account. Our checks will be collected by Yorkstone till our limit is reached and then sent to the broker who will invest the money either in T-bills, the spreads, or hold it in the customary clients' segregated account.

Appendix G is from Mr. Doran's letter of February 8, 1982 to Mr. B. Hallberg, Complaints Section of the CFTC, re: "Statement of Fact."

Text in pertinent parts is as follows:

In October 1981, I invested $15,000 through Yorkstone Research . . . . On January 28, 1982, I received confirmation that shows there is $1,065.00 left in my account.

The story is this. In September 1981, I read an article by Stephen Hart, who writes for the American Gold News (copy attached). Hart hosted an investment seminar in San Francisco on September 19, 1981 which I attended. A few days after the Seminar, I called James Massaro at Yorkstone, and requested some information on their spread trading program. After I received the information (copy attached), Massaro called me several times urging that

I send the money in right away as he said there was only so much money that could be traded in this program and that the cut off point was approaching rapidly because Harry Schultz was in the program himself and bringing in his investors. Massaro stressed that I should send the money in by express mail.

During conversations with Massaro, I was told the program did not have a single loss.

Yorkstone represented the spread trading system to be very low risk and that of the little risk, 100% would be covered by the purchase of T. Bills. An impression was given to me that Yorkstone was able to compile this 100% record, because they had equipment which would tell when a spread was out of line. Massaro mentioned that the same thing happens in the stock market,

and explained that the shares of Chrysler sold for a $2.00 per share difference between the East and West Coasts. But, he said you have to have the equipment to do the monitoring. From their literature and conversations with Massaro and Mark DeSanto of Yorkstone, they represented that they had equipment and a system that enabled them to compile a track record without a single loss.

I also asked Massaro what a worst case example would be of the most money would be at risk--he said $1,500, and I asked under what circumstances that would be, and he said "an act of God."

Appendix H is from Petitioner's Pre-Hearing letter of October 7, 1983, to the CFTC.

Text in pertinent parts is as follows:

Mr. Doran has been defrauded by Yorkstone in several ways. For one thing, his account was not traded in accordance with the system which was described in the literature and in my article. It appears that some time in December 1981 Mr. Massaro turned from a respected professional into an outright crook. As stated in my previous deposition, there was no advance warning of this happening. Yorkstone had built a good reputation by virtue of designing and implementing relatively low risk trading models. The Dual Diversity Spread is based on sound theory. Spreads by themselves if implemented with good money management are certainly less risky than outright futures contracts. The prin-

cipal risk is a change in the carrying charge due to interest fluctuations. Yorkstone was offsetting this risk by supplementing the trades with a small interest-sensitive component. Hence the word "Dual" Diversity.

When describing this trading technique I assured myself that the "track record" contained in the brochure was actual and not theoretical. Hence I demanded verification which was provided in form of the actual computer printouts. . . . I verified each trade and found them correct as shown in the literature. This convinced me that there was a real chance for some of my subscribers to benefit. To the extent that I told them of my findings, one might have assumed that I "recommended" the Dual Diversity Spread. As a matter of fact, I act as a reporter, and indeed my subscribers

understand this. If sometimes a bit of personal enthusiasm creeps in, my readers know that it represents personal opinion. I've often stated that I describe various investment methods the best I can, and that I am on a continued search for the best I can find. Naturally, there is a sense of satisfaction when I think that I've found a good conservative trading method.

As this point I'd like to emphasize that I firmly believe that the Dual Diversity Spread has validity if, and only if, it is implemented by sound money management. If we had let Yorkstone handle accounts in the early part of 1981 they would have shown the profits which have actually been made, as verified. Just why Massaro went crooked we don't yet know. Perhaps the truth will come to light when the FBI catches up with him. On July 26, 1982 the

special agent, Charles M. Ungermann (Room 502, U.S. Post Office & Court House, Albany, NY 12207, Phone 518-465-7551), called me to ask for information on Massaro. He divulged that a group of Texas investors had gotten the case against Massaro going. At that time I was told that Massaro had "gone South" . . . .

Something should be said about the "pool" which Massaro offered to trade for our subscribers. He proposed to aggregate smaller accounts so that they would reach the total of sufficient size which would make for sound money management, i.e., keeping the bulk in Treasury Bills as a backup. Perhaps Mr. Doran felt that his investment was of sufficient size so that his account could be handled on an individual basis. The correspondence is a bit ambiguous on this point. It is clear,

however, that Massaro somehow got the impression that it was OK with Mr. Doran if his account were traded on an individual basis. In Mr. Doran's definitive letter to Mr. Hallberg (Feb. 8, '82), which is part of the Docket, the narrative shows that Massaro pressured him into implementing his account as quickly as possible, evidently without regard to whatever "pool" may be forming. I don't understand why Massaro seemed so desperate at this point, but assume that he was already in trouble at that time and needed the commissions. At risk of repeating a previously made point, if Massaro and his organization had been "on the level," Mr. Doran's account, traded singly and by itself, could not have shown such losses. The situation was acerbated by Massaro putting on a second trade which

completely deviated from anything that was described in the program.

The wrongdoings of Yorkstone are so many, and have been so well described by Mr. Doran that there is no need to refer to them any further. But the point to be made is this: There was a pooled account in the process of being formed. When I learned from Mr. Doran what had happened in his account I immediately blew the whistle. I told everyone concerned to cancel all arrangements. Consequently, the contemplated pool never got off the ground. We all should be grateful to Mr. Doran for advising us.

Appendix I is from Petitioner's Post Hearing response of November 21, 1983, after reading the transcript of the "hearing," i.e., dialogue between ALJ Spruill and Complainant Doran, in Portland, OR, on October 12, 1983.

Text in pertinent parts is as follows:

As previously mentioned, I could not attend the Hearing because of a combination of reasons. At that time I had an accident which caused a gash above my right eye, needing seven stitches in the emergency room of Kaiser Hospital, with subsequent swelling (my eye bulged like a golfball, and the right side of my face was swollen and discolored. The concussion caused subsequent headaches . . .). Even now I'm not quite back to normal. Besides at that time my only brother was in the terminal stages of dying of cancer (he passed away just a few days before the hearing). So, it was really impossible for me to either

prepare nor travel to Portland for the Hearing.

Now, after reading the transcript I realize how prejudicial my absence turned out to be. As engineer I thought, naively, that written statements would carry the appropriate weight. But now I realize that an oral testimony on the side of the Complainant, without an opportunity for immediate oral rebuttal, can override everything that had been previously put into writing.

Frankly, I am upset by the false allegations and inferences which impugn my integrity, my honesty, and my sincerity. In the fifty years of my professional life I have not given cause for such character belittlement. I believe that the transcript reflects a gross misunderstanding of the part I played in the subject case and I

wish to explore every avenue available to me to forestall an error in judgment which may affect my reputation.

Inasmuch as it turned out that my inability to attend the Hearing has caused "a tilt" in the way my role as financial writer was portrayed, with an inference that I was in some sort of "complicity" with the felons at Yorkstone Research, it seems to be necessary to give me a chance to provide substantial proof of the contrary and to give incontrovertible evidence to the Court of my innocence as far as the losses of the Complainant are concerned. Judging from the weight that is attached to oral testimony, I herewith, therefore, request the Court to schedule another Hearing at which I can be present, or, alternatively, provide me with the opportunity (or some other chance of oral interrogation

(is a telephone hookup possible?) or for preparation of additional documentation, complete with testimonies from parties who have knowledge of my work and my character.

It appears that at the end of the Hearing the Court arrived at the conclusion that I had acted as a CTA. The evidence that evidently led to this erroneous conclusion was that a) I had been promised some sort of "compensation" from Yorkstone, b) that I had "recommended" the Diversity Spread Trade system in writing as well as during a seminar.

Without meaning to preempt my future, complete, testimony, I wish to address this point now:

(1) My articles in American Gold News dealt with "strategies" rather than with individual investments. I covered all types of investment media, including op-

tions, common stocks, convertible securities, . . . and commodities. The articles were REPORTAGE, i.e., I described the techniques to the best of my ability and used whatever analytical ability I may have due to my engineering background. It is not surprising that some of those techniques subsequently did not live up to their promise. On the whole, however, my articles proved very useful and I have plenty of evidence for this fact by the letters I received from satisfied subscribers.

When I studied the Yorkstone literature it seemed to me that I had found another low-risk strategy which could benefit my readers. My article was factual and merely presented the history in logical and easily readable form. When it appeared, I received a phone call from Massaro, president of Yorkstone, in which he complimented

me on my article and stated that it was the best he'd seen describing his strategy. He then told me that he'd like to pay me some small part of the commissions that may result. Nothing specific was promised. It was in general terms as his token of appreciation of what (he said) I had done for Yorkstone. I did neither accept nor reject his offer. Nothing was said re compensation in any subsequent conversations or correspondence and, of course, nothing was paid. I volunteered this information to Mr. Doran early in '82.

Not only did I not derive any benefit from the publication of my article, but, instead, it was time consuming and costly for me to warn those who had shown interest in my article of the subsequent fraudulent actions of Yorkstone.

(2) Did I exert "due diligence" before bringing the Diversity Spread to the attention of my readers and seminar attendees?

At the Hearing some derogatory statements were made as to the genuineness of the computer records and the logic behind the spread trades. It should be pointed out that the spreads were based on temporary divergencies and inefficiencies among different contracts. They don't occur often, but they DO OCCUR. The examples stated in Yorkstone's literature were authentic.

The verification of the computer printouts took me the better part of a day inasmuch as they include not only the transactions but also the reiteration of open positions and "marking to the market" when necessary. First I thought I had dis-

covered a "gap" in the continuity of the record but this was remedied when I called Yorkstone and another set was mailed to me. In short, the records do confirm all the trades as stated in the brochure. This is a matter that can be proven.

Having that proof, I communicated that fact to those who had written me. Furthermore, Yorkstone had suggested that those with modest funds could "pool" the smaller amounts to reach the required minimum for an account. I also communicated this fact to my correspondents. At this point I must emphasize that I had the intention of adding my own funds to that pooled account and, fortunately as it turned out, had not already done so when Mr. Doran reported the calamity in his account.

To summarize this section, I exerted every reasonable "diligence" before re-

porting positively to my readers who had shown interest. I was "a believer," and conveyed my belief--nothing more.

What happened in the Complainant's account will probably remain a mystery, but it is clear, without a shadow of a doubt, that his money was traded in an irregular fashion, and that the Dual Spread strategy had not even been employed. So, in a sense, the whole concept of the diversity spread and its risk-reducing features was not even put to a test in his account. If Yorkstone had been honest Doran's losses would not have occurred.

Therefore, and in view of the above, I herewith request the Court to provide me with an opportunity to elaborate on above statements which I am making under oath before a Notary, by providing a date for oral testimony, or failing that, for a

further written testimony supported by witnesses and affidavits. In view of some witnesses being on the other side of the continent, this requires sufficient time, ninety days from this date is therefore requested for the written testimony if an oral hearing cannot be arranged. It may be possible to arraign Mr. Massaro inasmuch as I'm informed he resides in Loudonville (suburb of Albany, NY). Also, the CFTC attorney, William J. Dreyer, may be helpful in supplying facts regarding Massaro's outright fraud. When all facts are together, I believe that the Court will concur that there is no case against me.

Appendix J is Petitioner's Application for Commission Review date December 23, 1983, addressed to the CFTC.

Text is as follows:

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1. OPPORTUNITY FOR ORAL HEARING DENIED.

From reading Administrative Judge Spruill's Initial Decision one might infer that I attended the hearing and offered testimony.

As a matter of fact, I was prevented from appearing due to an accident, a fact known to the Judge in sufficient time prior to the hearing to make other arrangements.

Furthermore, because of the time and place of the hearing, it was impossible to retain an attorney or representative who would fly from San Francisco to Portland, Oregon on such short notice. Hence, in effect, I was denied the benefit of counsel.

2. SOLE DEFENDANT'S DOMICILE IS IN SAN FRANCISCO WHEREAS HEARING WAS SCHEDULED IN PORTLAND, OREGON.

The fraudulent firm, Yorkstone Research, Inc. and its president and senior staff member, James Massaro and Mark DeSanto were in default. Settlement with Lincolnwood, Inc. and Alan Cohen had been effected prior to the hearing, and American Gold News had been dismissed. Hence, I was the only respondent. Portland, Oregon was stipulated as the site of hearing counter to my objection.

3. PREJUDICIAL STATEMENTS AT THE HEARING.

An examination of the transcript of the Hearing reveal a number of errors in fact, and allegation which are not only unsubstantiated, but are misleadingly stated. Subsequent written rebuttal has been essentially ignored. For this reason, suggestion was made for an oral hearing, possibly

by means of a multi-party telephone hookup, if no appearance can be scheduled at a time and place convenient and fair to the parties. This suggestion and request have been ignored.

Some of the misstatements and errors are alluded to as follows to show the need for a re-hearing or at least the opportunity to file a complete documented brief:

a) Mr. Doran was not "induced" by me to invest with Yorkstone. Conversely, Mr. Doran INSISTED on investing on his own. He aggressively pursued this investment by bombarding me with numerous letters and phone calls, and talking with Massaro privately by phone, and finally investing without making it known to me. He attended my seminar without revealing any motive other than obtaining the education which I

offer by virtue of lectures and guest speakers. The construction that I "induced him" to invest is totally false. I might add that my financial column, "Investor's Perspective" and my seminars are educational in character and all my material is gathered from official sources. At no time are my writings/teachings motivated by any offer of financial inducements, commissions or otherwise. My readers and seminar attendees know this and respect me for my impartiality. A bulging file of complimentary letters attests to this.

b) Mr. Doran claims that the Yorkstone program was misrepresented, whereas, in fact, it was theoretically soundly based and had generated profits in the past. This fact is authenticated. At the time Mr. Doran chose to make his investment,

Yorkstone initiated fraudulent actions which could not have been anticipated.

c) The transcript reveals that I was described as cooperating with Yorkstone as if there had been some understanding between the fraudulent firm and myself. This is totally false and undeservedly impugns my character. I look back on a career as engineer and college professor of over thirty years with impeccable record and many distinctions. Upon retirement I embarked upon teaching investment strategies in order to draw on my personal experience during my professional life. The emphasis is always on methods and strategies rather than on individual stocks, bonds, and "recommendations of the moment." Furthermore, I stress reducing risk. In the case of Yorkstone, I was misled as much as many others: As I was told by the FBI agent who

pursued the case against Yorkstone, Massaro and his staff, upon his instruction, made fraudulent statements to me as well as others who received and read his literature. I had nothing whatever to do with this and in no way assisted or abetted him inasmuch as I had no knowledge thereof, received no money, and would have invested just as Mr. Doran did and also would have lost my money.

4. ALLEGATION THAT I ACTED AS A CTA AND THAT I WAS REQUIRED TO REGISTER AS SUCH.

I am a journalist and not an "advisor." In fact, it is particularly important to me that I retain the impartiality of a writer, teacher and reporter who is not influenced by monetary inducements to "sell" an investment product. To deny me the right to pursue my chosen profession would deprive

me of my present source of (meager) income, and would deny me the right to free speech.

Two incidents were used to support the erroneous conclusion that I acted as a CTA: (1) the payment offer, (2) the proposed formation of a pool.

(1) The payment offer: After I had written the article regarding Yorkstone's program Massaro called me to compliment me on my presentation. He then said that he wanted to reward me for the writeup which, he said, was the best he'd ever seen. In that connection he offered, vaguely, some payment, without specifying the amount nor the time. I doubt that the offer was to be taken seriously. At any rate, nothing was further said on that subject, the offer was not repeated, and needless to say, no amount was either discussed nor paid. It

should again be pointed out that this unserious offer was made without my asking for it, and it was made AFTER the article had been published. There never was an understanding between Massaro and me. In light of the following FBI investigation it became clear that Massaro was in the habit of lightly offering all sorts of inducements and promises without actually making any commitments.

(2) Yorkstone required an amount of investment in their trading program which exceeded most of my readers' preference. It was therefore Massaro's suggestion that the readers deposit their money in a separate account to accumulate the minimum of one or more investment unit(s). This account was to be segregated. This pooling idea was Massaro's; I conveyed it to those readers who had inquired, and I fully in-

tended to add some of my own investable funds to that account. Massaro's subsequent fraudulent actions prevented that pool from ever becoming operative. It needs to be emphasized that I had nothing to do with the pool's formation.

Now reference is made to Mr. Doran's letter to Mr. Budd Hallberg, of the Commission's Complaint Section, dated February 8, 1982 in which he states, in part, that he called Massaro, that Massaro urged him several times to send money, and then he avers that while those conversations were private and implied a separate investment, that Mr. Doran "assumed" he would be part of the pool (which had not yet been formed). Mr. Doran then refers to the "Investors' Network" implying that it has something to do with such investment. This is incorrect. The Investors' Network simply comprises

those who attended one of my seminars. Attendees are alumni, and are privileged to meet for followup meetings, there discuss strategies on a more advanced level. The Network has never and will never have anything to do with actual investment of personal funds. I have meticulously avoided advising my attendees how to spend their investment dollars or giving personal consultations. And as to the investing of my personal funds, it is a matter of record that I've frequently put "my money where my mouth is," i.e., have invested in strategies which I describe to readers or attendees.

SUMMARY

Issues of Procedure and Law are involved here. First, I was denied opportunity to appear in court either in person or by representation. Inasmuch as I was the only

respondent, the other defendants either having settled with a token payment or (in case of the fraudulent firm) by virtue of defaulting, and the publications having been dismissed, there was no due regard to my convenience when setting time and place for the hearing. It was totally unforeseen that anyone would impugn my honesty much less that I would be required to register as something which I never chose to be nor ever want to be, a CTA. I was never "soliciting" any business, and never prompted Mr. Doran to make his investment. In my post hearing response I requested opportunities for preparing and presenting a more complete response to the allegations at the Hearing which turned out to be no more than a dialog between Complainant the Judge. That request was denied.

THEREFORE, it is requested that the INITIAL DECISION of December 9, 1983 be set aside and that I be given the opportunity for an oral hearing and for the preparation of the supporting documents including testimonies, for my defense.

Dated this 23 day of December 1983

(s)

STEPHEN V. HART

Appendix K is the CFTC letter of May 28, 1985 to the U.S. Court of Appeals, requesting reclassification of the Court's Unpublished Memorandum.

COMMODITY FUTURES TRADING COMMISSION
2033 K STREET, N.W., WASHINGTON, D.C. 20581

OFFICE OF THE GENERAL COUNSEL

May 28, 1985

Phillip B. Winberry, Clerk
United States Court of Appeals
for the Ninth District
P.O. Box 547
7th & Mission Streets
San Francisco, CA 94101

Re: Stephen V. Hart v. Commodity Futures Trading Commission and Richard Doran, No. 84-7394

Dear Mr. Winberry:

Pursuant to Rule 21(d) of this Court, the Commodity Futures Trading Commission ("Commission") hereby respectfully requests that the memorandum decision issued by the Court on May 1, 1985 is the above-captioned case be published. As explained below, this decision addresses two issues of im-

portance to the Commission's regulatory mission.

First, the Court's decision contains an important discussion of the definition of "commodity trading advisor" in the Commodity Exchange Act ("Act"). The Act and the Commission's regulations establish high standards governing the conduct of commodity trading advisors. A "commodity trading advisor" is defined as

> any person who, for compensation or profit, engages in the business of advising others . . . as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery . . . .

7 U.S.C. § 2 (1982). However, the Act excludes from this definition "any news reporter, news columnist, or news editor of the print or electronic media . . . ." Id. In its May 1 decision, the Court analyzed this "news reporter" exception to the "commodity trading advisor" definition, con-

cluding that an individual who writes a column on commodity investments but also corresponds with investors and conducts investment seminars for a fee cannot avail himself of this exception. The Court also explained that an individual need not receive compensation from a commodity broker in order to qualify as a "commodity trading advisor."

Second, the Court's decision contains a significant discussion of the provision of the Act that conditions an individual's right to appeal from a Commission reparations award upon the filing of an appropriate bond. 7 U.S.C. § 18(e) (1982). The Court rejected the argument that a petitioner's ignorance of the bond requirement excuses the timely filing of the bond when the administrative decision contains the

Commission's standard language referring to this section of the Act.

These two issues are apt to be raised repeatedly in Commission litigation before the United States Courts of Appeals, yet there is very little published precedent on point. By publishing the memorandum decision in this case, the Court would provide guidance to future litigants and would assist in the development of a consistent body of commodity futures case law.

Respectfully submitted,

(s)

KENNETH M. RAISLER
General Counsel

cc: Charles Jarvis Murray, Esq.
681 Market Street
Suite 401
San Francisco, CA 94105

Richard Doran
415 S.W. Alder Street
Portland, OR 97204

Appendix L is U.S. Court of Appeals Order, dated July 9, 1985, denying CFTC's Request for Publication.

Text is as follows:

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN V. HART, Petitioner,

v. COMMODITY FUTURES TRADING COMMISSION,

Respondent, RICHARD DORAN, Real Party.

No. 84-7394 DC No. CFTC 82-R459

ORDER

On Appeal from an Order of the Commodity Futures Trading Commission

Argued and Submitted March 6, 1985--

Portland, Oregon

Before: KENNEDY and NORRIS, Circuit Judges; and LYNCH*, District Judge.

Respondent's request for publication of the disposition is denied.

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* The Honorable Eugene F. Lynch, U.S. District Judge for the Northern District of California, sitting by designation.